U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: January 6, 1992
CASE NO. 79-CETA-128

IN THE MATTER OF

JACOB BRETTHOLZ.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), [1] and regulations at 20 C.F.R. Parts 675-680 (1990). The complainant, Jacob Brettholz, filed exceptions to the Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ), insofar as it held that complainant had not established the lack of good cause for his termination from employment and therefore was not entitled to back pay for the period he was suspended prior to being reinstated in his CETA position. The Regional Administrator of the Employment and Training Administration petitioned for a remand to the ALJ for further proceedings including notice to the grantee and subgrantee that

[1] CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 15014791 (1988) provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

they are necessary parties, submission of additional evidence on the termination and back pay issue, and a new decision. 2/

On May 22, 1991, and August 14, 1991, Orders were issued advising the parties that the pleadings submitted to the ALJ as well as any which may have been submitted to the former Secretary were missing. The parties were given an opportunity to file briefs, including copies of any prior submissions, and were directed to show cause why this case should not be decided based on the available record.

Counsel for the subgrantee, West Bronx Jewish Community Council, requested and was granted a continuance to locate records which'he asserted would establish that a determination was reached that complainant was entitled to approximately $2,200.00 in back wages and, further, that complainant was paid this amount. Counsel has submitted the additional records and this case is now ready for review.

BACKGROUND

Complainant, Jacob Brettholz, was assigned on March 15, 1978, by the subgrantee, to work as a mortgage analyst-urban planner for the West Bronx Housing Neighborhood Resource Center (WBH). Complainant's Exhibit (CX) 46. At a WBH meeting on or about August 16, 1978, complainant reported that he had transmitted for evaluation five mortgage applications to the Community Preservation Committee (CPC). cx 14. On August 21,

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2/ The Regional Administrator's petition appears to have been motivated in part by the ALJ's D. and 0. which did not list either the grantee or subgrantee on the service sheet.

1978, Leo Pariser, the Acting Director of WBH, sent complainant a memorandum stating that effective immediately complainant% employment was terminated because, among other reasons, only one mortgage application had been received by CPC. CX 5.

Complainant received a hearing on September 28, 1978, Respondents' Exhibit (RX) 2, and by letters dated October 5 and 20, 1978, WBH upheld the termination. Joint Exhibit (JX) 1; CX 28. The subgrantee denied complainant's appeal. JX 1. Complainant then appealed to the grantee, the City of New York Department of Employment. The grantee, by letter dated December 26, 1978, concluded that the notice of termination was defective [3/] and ordered complainant's reinstatement. Because the grantee found an adequate basis for termination for cause, however, it denied an award for backpay. CX 4. By letter dated May 10, 1979, the Regional Administrator upheld the grantee's decision, JX 1, and complainant requested a hearing before an administrative law judge.

The ALJ first noted that complainant had the burden of establishing that there was not good cause for his termination. The ALJ next alluded to complainant's admission that CPC only received one mortgage application of the five that allegedly were sent. See Transcript (T.) at 906. Finding that the record contained no copies of the missing documents or copies of letters of transmittal, the ALJ stated that there was "nothing to

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[3/] The notice charged complainant with falsification of records rather than misrepresenting that mortgage applications had been completed and transmitted to CPC. CX 5.

substantiate [complainant%] oral testimony that he in fact initiated the actual transmission of them and very little to substantiate that they had even been prepared, much less completed." D. and 0. at 3. The ALJ therefore concluded that the record fell far short of meeting complainant's burden. Id.

The ALJ then referred to the Regional Administrator% Regional Directive No. 52-76, paragraph 5, (based on Department of Labor Field Memorandum 312-76) which states in relevant part that "[w]hen it is found that the procedural requirements of Section 98.26 were not followed in discharging a participant . . . the decision on whether to award backpay will depend on the specific circumstances of each case. The following factors will be taken into consideration: ...." CX 2. Because the Regional Administrator found back pay inappropriate since there was only procedural error, see T. at 89, 812, and therefore did not consider the specific circumstances of the case, the ALJ ordered the case remanded to the Regional Administrator to reconsider the back pay issue taking into account the factors specified in the Field Memorandum and Regional Directive. D. and 0. at 4-5.

DISCUSSION

A. Procedural Issues

Counsel for the subgrantee has submitted documentation pertaining to In the Matter of Jacob Brettholz v. New York City Department of Employment, Case No. 80-CETA-196, ALJ Dec., Aug. 10, 1982. In that case, the ALJ found that complainant was

unjustly terminated from his CETA employment on January 16, 1979, and entitled to back pay from that date until March 14, 1979. The documentation tends to establish that the parties settled on the amount of back pay and that complainant received the agreed upon amount.

The instant case, as noted supra, concerns a prior termination occurring on August 21, 1978. The release submitted by counsel states that it applies to the January 16, 1979, termination and "shall not be effective to release" the grantee from any claims "in pending litigation now awaiting decision by the United States Secretary of Labor arising from [complainant's] termination by the West Bronx Jewish Community Council in a City-sponsored CETA program on or about August 21, 1978." The documentation, therefore, has no bearing on any potential liability for back pay in this case.

The Regional Administrator, by letter dated May 15, 1979, advised the grantee of the final determination in this case. JX 1. The grantee, therefore, was on notice that it would be a party in any proceedings before an ALJ. See 20 C.F.R. § 676.88(g). Moreover, at the hearing, attorneys for both the grantee and subgrantee appeared. T. at 56, 70. If notice of their party status were for some reason not given by the ALJ, that would be harmless error in view of their appearances. 4/ All parties had the opportunity to present evidence and,

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4/ The release in Case No. 80-CETA-196 also denotes the subgrantee's involvement in the litigation.

accordingly, the Regional Administrator% petition for a remand is denied.

Counsel for the grantee argues that to decide this case based on a partial record, and after a delay of eleven years, "would violate all precepts of procedural due process and fundamental fairness" and would be inconsistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1988). [5/] As noted in the May 22, 1991, Order to Show Cause, the only items missing from the record were the parties' pleadings and the parties were given the opportunity to resubmit them or file new pleadings. No pleadings were received other than the grantee's recent submission. To the extent that the earlier pleadings are no longer available, that would be the parties' responsibility as no final action had been taken and the parties would have no justification for purging their files. [6/] Under these circumstances, deciding this case on the existing record is fair to all parties and does not violate the APA or any due process rights.

[5/] The grantee represents that it has no record of receiving the ALJ's D. and 0. prior to 1991. See note 2 supra. A review of the record, however, reveals that the Secretary issued a briefing schedule on May 22, 1980, and served a copy by certified mail on the City of New York, Office of the Corporation Counsel. The return receipt is signed and dated May 28, 1980. I therefore conclude that the grantee was at least constructively aware that the ALJ's D. and 0. had been issued.

[6/] The official files of the Office of Administrative Appeals, which assists the Secretary in adjudicating CETA cases, disclose no final action in this case nor any status inquiries from the grantee or subgrantee. Nor have I been apprised of any such inquiries directed to the ALJ.

With respect to the allegation of delay, it is clear that before an action may be set aside for lack of punctuality, the aggrieved party must show that it was prejudiced by the delay. Citv of Camden. New Jersey v. United States Department of Labor, 831 F.2d 449, 451 (3d Cir. 1987); Panhandle Cooperative Association. Bridgeport, Nebraska v. E.P.A., 771 F.2d 1149, 1153 (8th Cir. 1985); Estate of French v. Federal Enersv Reaulatorv Commission, 603 F.2d 1158, 1167 (5th Cir. 1979). The grantee's general claim of prejudice is without merit because the case was accepted for review within one month of when the ALJ's decision was issued and all parties had the opportunity to address the issues at that time. Moreover, the record is barren of any suggestion that the grantee at any time complained about the pace of the proceedings in this case. F.T.C. v. J. Weinaarten, Inc., 336 F.2d 687, 691 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). Accordingly, there is no basis to refrain from deciding this case because of delay. See In the Matter of Terry O'Boyle, Case No. 79-CETA-181, Sec. Dec. Nov. 12, 1991 (delay of eleven years, by itself, does not prejudice the parties).

B. Back Pay

Although the record in this case is extensive, the evidence bearing on complainant's termination of employment at WBH is, as the ALJ found, sparse. Neither of the two WBH employees with the best knowledge concerning the status of the mortgage

applications, Leo Pariser and his secretary Edith Blitzer, appeared to contest complainant's testimony. 7/

Complainant testified that he prepared five mortgage applications and submitted them to Mr. Pariser for approval prior to sending them to CPC. T. at 906, 930, 978. He stated that he gave four of the applications to Ms. Blitzer for mailing. T. at 931. Complainant further testified that the working papers concerning the applications not received by CPC were missing from the office files. T. at 927.

The ALJ made no finding that complainant's testimony was not credible, only that it was not substantiated by other evidence. D. and 0. at 3. Substantiation, however, is not required. Under these circumstances, where the testimony is uncontradicted and not rejected on credibility grounds, the fact finder must accept it. Smith v. Commissioner of Internal Revenue, 800 F.2d 930, 935 (9th Cir. 1986) (court not compelled to accept uncontradicted testimony when it doubts credibility of a witness); Orlando v. Heckler, 776 F.2d 209, 213 (7th Cir. 1985) (to reject testimony, administrative law judge must specifically conclude that claimant's testimony is not credible); Tieniber v. Heckler, 720 F.2d 1251, 1254 (11th Cir. 1983) (finding as to credibility must be obvious to the reviewing court): Stone v. First Wvoming Bank N.A., Lusk, 625 F.2d 332, 342 n.15 (10th Cir. 1980)

7/ Complainant subpoenaed Mr. Pariser, CX 3, and while, as the Regional Administrator observed, complainant did not attempt to have Ms. Blitzer testify, T. at 1380, it is incumbent on the grantee and subgrantee to present evidence in support of their position.

(testimony as to a simple fact capable of contradiction, standing uncontradicted, must be taken as true). Accordingly, the evidence of record compels the conclusion that complainant's termination of employment was improper substantively and the ALJ's finding to the contrary is reversed. Complainant is therefore entitled to a back pay award as there would be no justification for terminating his employment. New York Urban Coalition v. United States Department of Labor, 731 F.2d 1024, 1031 (2d Cir. 1984). In view of this conclusion, there is no need to remand for consideration of the "specific circumstances" of this case. See page 4 supra.

Complainant requested back pay of $408.00/wk for twenty-one weeks and reimbursement for seven or eight vacation days. He also asked for interest on these amounts. T. at 1343-44. The requested back pay is consistent with complainant's annual salary of $21,600.00, T. at 863, and the requested period for back pay corresponds with his suspension, August 21, 1978, to January 8, 1979. T. at 859, 1290. Complainant is therefore awarded back pay of $9,139.20, which includes payment for seven vacation days. Interest is payable from January 8, 1979, until the back pay is paid. Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 58 (2d Cir. 1984). The appropriate rate of interest is that established under 26 U.S.C. § 6621 (copy of applicable rates attached).

ORDER

The ALJ's finding that complainant had not established entitlement to an award of back pay is REVERSED and his order

remanding the case to the Regional Administrator is VACATED. The grantee, City of New York Department of Employment, and the subgrantee, West Bronx Jewish Community Council, are jointly and severally liable to pay complainant $9,139.20 plus interest. This payment shall be from non-Federal funds. Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.

Secretary of Labor

Washington, D.C.

and twelve percent for large corporate underpayments.

Under the Internal Revenue Code, the rate of interest is determined on a quarterly basis, the rate on underpayments is one percent higher than the rate on overpayments, and the rate for large corporate underpayments is two percent higher than the rate on underpayments. The rate announced today is computed from the federal short-term rate based on daily compounding determined during July 1991.

Rev. Rul. 91-50, announcing the new rates of interest, is attached and will appear in Internal Revenue Bulletin No. 1991-37, dated September 16, 1991.

Rev. Rul. 91-50

Section 6621 of the Internal Revenue Code establishes differential rates for allowance of interest on tax overpayments and assessment of interest on tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 2 percentage points. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) of the Code, as added by the Revenue Reconciliation Act of 1990, Pub.L. 101-508, section 11341(a)(2), 104 Stat. 1388 (1990), provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) shall be applied by substituting "5 percentage points" for "3 percentage poinu." See section 6621(c) and section 301.6621-3T of the Temporary Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621-3T are generally effective for periods after December 31, 1990.

Section 6621(b)(1) of the Code provides that the Secretary shall determine the federal short-term rate for the first month in each calendar quarter.

Section 6621(b)(2)(A) of the Code provides that the federal short-term rate determined under section 6621(b)(1) for any month shall apply during the first calendar quarter beginning after such month.

Section 6621(b)(3) of the Code provides that the federal short-term rate for any month shall be the federal short-term rate determined during such month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate shall be increased to the next highest full percent).

Notice 88-59, 1988-1 C.B. 546, announced that in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621 of the Code, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

Rounded to the nearest full percent, the federal short-term rate based on daily compounding determined during the month of July 1991 is 7 percent. Accordingly, an overpayment rate of 9 percent and an underpayment rate of 10 percent are established for the calendar quarter beginning October 1, 1991. The underpayment rate for large corporate underpayments for the calendar quarter beginning October 1, 1991, is 12 percent. These rates apply to amounts bearing interest during that calendar quarter.

Interest factors for daily compound interest for annual rates of 9 percent, 10 percent and 12 percent were published in Tables 15, 16 and 18 of Rev. Pra. 83-7, 1963-l C.B. 583, 598, 599, and 601.

Annual interest rates to be compounded daily pursuant to section 6622 of the Code that apply for prior periods are set forth in the accompanying tables.

DRAFTING INFORMATION

The principal author of this revenue ruling is Marcia Rachy of the Office of Assistant Chief Counsel (Income Tax and Accounting). For further information regarding this revenue ruling, contact Ms. Rachy on (202) 566-3886 (not a toll-free call).

TABLE OF INTEREST RATES
PERIODS BEFORE JUL. 1, 1975 — DEC. 31, 1986
OVERPAYMENTS AND UNDERPAYMENTS

Period	Rate	Daily Rate Table in 1983-1 C.B.
Before Jul. 1, 1975	6%	Table 2, pg. 586
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 588
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 587
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 586

Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 588
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 588
Jan. 1, 1983—Jun. 30, 1983	16%	Table 22, pg. 605
Jul. 1, 1983—Dec. 31, 1983	11%	Table 17, pg. 600
Jan. 1, 1984—Jun. 30, 1984	11%	Table 41, pg. 625
Jul. 1, 1984—Dec. 31, 1984	11%	Table 41, pg. 625
Jan. 1, 1985—Jun. 30, 1985	13%	Table 19, pg. 602
Jul. 1, 1985—Dec. 31: 1965	11%	Table 17, pg. 600
Jan. 1, 1986—Jun. 30.1986	10%	Table 16, pg. 599
Jul. 1, 1986—Dec. 31; 1986	9%	Table 15, pg. 598

TABLE OF INTEREST RATES
FROM JAN. 1, 1987 — PRESENT

	Overpayment3			*Underpayments*		
	Rate	*Table*	*Pg.*	*Rate*	*Table*	*Pg.*
Jan. 1, 1987—Mar. 31, 1987	8%	14	597	9%	15	598
Apr 1, 1987—Jun. 30, 1987	8%	14	597	9%	15	598
Jul. 1.1987—Sep. 30.1987	8%	14	597	9%	15	598
Oct. 1: 1987—Dec. 31, 1987	9%	15	598	10%	16	599
Jan. 1, 1988—Mar. 31, 1988	10%	40	624	11%	41	625
Apr. 1, 1988—Jun. 30.1968	9%	39	623	10%	40	624
Jul. 1, 1988—Sep. 30 1988	9%	39	623	10%	40	624
Oct. 1,.1988—Dec.31. 1988	10%	40	624	11%	41	625
fan. 1,1989—Mar.31,1989	10%	16	599	11%	17	600
Apr. 1, 1989—Jun. 30, 1989	11%	17	600	12%	18	601
Jul. 1, 1989—Sep. 30, 1989	11%	17	600	12%	18	601
Oct. 1, 1989—Dec. 31, 1989	10%	16	599	11%	17	600
Jan. 1, 1990—Mar. 31, 1990	10%	16	599	11%	17	600
Apr. 1, 1990—Jun. 30, 1990	10%	16	599	11%	17	600
Jul. 1, 1990—Sep. 30.1990	10%	16	599	11%	17	600
Oct 1, 1990—Dec. 31, 1990	10%	16	599	11%	17	600
Jan. 1, 1991—Mar. 31, 1991	10%	16	599	11%	17	600
Apr. 1, 1991—Jun. 30, 1991	9%	15	598	10%		
Jul. 1. 1991—Sep. 30. 1991	9%	15	598	10%	16 16	599 599
Oct. 1: 1991—Dec. 31, 1991	9%	15	598	10%	16	599

RATES FOR LARGE CORPORATE UNDERPAYMENTS
FROM JAN. 1, 1991 — PRESENT

	Rate	*Table*	*Pg.*
Jan. 1, 1991—Mar. 31. 1991	13%	19	602
Apr. 1, 199—Juun. 30, 1991	12%	18	601
Jul. 1, 1991—Sep. 30, 1991	12%	18	601
Oct. 1, 1991—Dec. 31.,1991	12%	18	601

[¶ 46,431] IRS Information Letter, August 20, 1991.

Retirement plans: Limitations on contributiona and **benefits: Governmental plans.—In** a **letter** from Mr. Ken **Yednock,** Chief, Employee **Plans Projects** Branch, Internal Revenue **Service,** to Mr. **August D. Fields, Godwin, Carlton &** Maxwell. **Dallas, Texas, the Internal Revenue Service answers various questions regarding the appliation** of Code Sec. 415 **generally and with respect to governmental plans as defined in Code Sec 414(d). The** letter cauaons **that it is not a ruling and may** not be relied on with **respect** to' any specific **transaction.** Back **references: ¶ 26692.04** and **2670G.02.**

This letter is in **rtsponst to** your **rqucst** for **general information, dated Junel5,1991, regarding the application of the limitations of section 413 under the Internal Revenue Code** to state **and local governmental plans, as defined in section 414(d) of the Code.** First, you ask **about several issues concerning section 415** in general, **such as the inclusion of** certain **items as compensation. the application** of **the limits to disability and** death benefits, and the treatment **of employee and pick-up contributions. Second, you ask several questions concerningthe special limitation under section 415(b)(10) of the Code, as added by the Technical** and **Miscellaneous Revenue Act of 1988.**

Section 1. The following questions address certain provisions generally under section 415 of the Code.

Question 1. May contributions described under sections 403(b), 414(h)(2), or 457 of the Code bt included in the definition of compensation for

CERTIFICATE OF SERVICE

Case Name: In the Matter of Jacob Brettholz

Case No. : 79-CETA-128

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on JAN 6 1992.

Carl Lagus

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